Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS TURNER,

Plaintiff,

vs.

W.W. GRAINGER, et al.,

Defendants.

NO. C09-1068RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Plaintiff's motion to compel (Dkt. # 22). The court held a telephone conference to discuss this motion on April 13, 2010. This order memorializes the oral rulings from that conference, where the court DENIED the motion (Dkt. # 22).

II. BACKGROUND

Plaintiff Thomas Turner filed this lawsuit against his former employer, W.W. Grainger, Inc. ("Grainger"), his former manager Ronald Hansen, and his unnamed former managers and supervisors at Grainger, contending that his employment was wrongfully terminated. According to Grainger, Mr. Turner was terminated because he improperly used his employee account to purchase items to benefit himself and his friends and family. Mr. Turner claims that his termination constitutes age discrimination and retaliation.

During a deposition of Mr. Hansen, Plaintiff's counsel asked him questions about a telephone conversation he had with officers from Grainger's legal, risk management, and human resources departments. Mr. Turner was suspended and then terminated shortly after this call. Counsel asked Mr. Turner whether he had a decision-making role in Mr. Turner's termination, and Mr. Hansen answered that he made a recommendation regarding termination but the ultimate decision was not his. *See* Mann Decl. (Dkt. # 22-2), Ex. A at 6:20-23. Plaintiff's counsel then asked Mr. Hansen who asked him for a recommendation, and Mr. Hansen answered that the people he talked to were from the legal, human resources, and risk management departments. After he gave that answer, defense counsel instructed Mr. Hansen not to disclose anything about the conversations with Grainger's in-house counsel, Hank Galatz, because those conversations are protected by the attorney-client privilege. *See* Mann Decl., Ex. A at 8:15-18.

Plaintiff's counsel then asked Mr. Hansen if he could name the people who he talked to on the telephone about Mr. Turner's termination, and Mr. Hansen named them. Plaintiff's counsel asked if Mr. Hansen provided them with a recommendation, and Mr. Hansen answered that he did. *See* Mann Decl., Ex. A at 9. After Plaintiff's counsel asked him what recommendation he made during the conversation, defense counsel instructed Mr. Hansen not to answer because in-house counsel participated in the conversation. *Id*.

Plaintiff's and defense counsel then discussed on the record whether the attorney-client privilege applied to this phone call. The parties then recessed and discussed the issue further off the record. After resuming the deposition, Plaintiff's counsel asked Mr. Hansen to again specify the recommendation he made during the phone call. Defense counsel again objected to the extent that Mr. Galatz was present for that conversation, but instructed Mr. Hansen to answer the question if he had otherwise provided a recommendation.

Mr. Hansen then answered that he did not make a recommendation, but instead discussed possibilities and options. *See* Mann Decl., Ex. A at 11-12. Plaintiff's counsel asked Mr. Hansen what possibilities and options were discussed, and defense counsel objected on privilege grounds and instructed Mr. Hansen not to answer. Plaintiff's counsel asked Mr. Hansen whether other specific topics (such as Mr. Turner's age, his longevity of employment, or Grainger's severance policy) were discussed during the phone call — and defense counsel instructed Mr. Hansen not to answer any of those questions. *Id.*, Ex. A at 52.Plaintiff's counsel then asked Mr. Hansen whether he solicited Mr. Galatz's legal advice, and Mr. Hansen answered that he did not. *Id.*, Ex. A at 108:6-14. He elaborated that the conversation reviewed policy problems, and served to discuss whether Mr. Turner had violated Grainger's guidelines or policies, and if so, what should be done next. *See id.*, Ex. A at 108:25-109:7.

Though this deposition was thereafter completed, for reasons unrelated to the dispute regarding privilege, Grainger offered to present Mr. Hansen for re-deposition. Mr. Turner filed this motion to compel, asking that the court require Mr. Hansen to answer the questions that defense counsel instructed him not to answer in the previous deposition.

III. ANALYSIS

The Federal Rules of Civil Procedure provide that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). The attorney-client privilege protects communications with in-house counsel if providing legal advice is the purpose of the communication. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 795 (E.D. La.

2007).

Mr. Galatz has stated that he participated in the phone call at issue for the purpose of providing his "legal thoughts as they related to Mr. Turner's misconduct." Galatz Decl. (Dkt. # 29) ¶ 3. As such, the call at issue appears to fall squarely within the coverage of the attorney-client privilege. Mr. Turner has not provided this court with any basis to believe that Mr. Galatz's provision of legal advice was not the primary purpose of the phone call. In the absence of that evidence, the court concludes that the attorney-client privilege protects the conversation with Mr. Galatz.

The court also finds Mr. Turner's waiver/unfairness argument to be unavailing. Mr. Turner contends that it would be unfair to apply the attorney-client privilege here because the phone call at issue was "a decision-making call" and is thus "essential to the discovery of the process and motivation for [Mr. Turner's] investigation, suspension and termination." Pltf.'s Supp. Reply (Dkt. # 32) at 3. But the record does not support that characterization of the conversation. Instead, the record indicates that no final decisions were made during the conversation at issue, and that in any event Mr. Galatz was not a decision-maker with regard to Mr. Turner's termination. *See* Galatz Decl. ¶ 3; Mann Decl., Ex. A at 6:19-23, 12:1-2. Mr. Turner has not established that the privileged information sought is necessary to his case, such that the privilege should not apply.

IV. CONCLUSION

Accordingly, the court DENIES Plaintiff's motion to compel (Dkt. # 22). If the Plaintiff re-deposes Mr. Hansen, as offered by the Defendant, the Plaintiff may not inquire with regard to the privileged communications addressed in this order. The Plaintiff may inquire as to other topics, including but not limited to: (1) the identity of the decision-maker with regard to Mr. Turner's termination; (2) when the decision to terminate Mr. Turner was made; (3) whether Mr. Hansen made a recommendation regarding Mr. Turner's termination; and (4) communications Mr. Hansen made during conversations where Mr. Galatz was not present.

DATED this 16th day of April, 2010.

The Honorable Richard A. Jones
United States District Judge